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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LEWIS E. HARDIN,

Defendant and Appellant.

B208895

(Los Angeles County  
Super. Ct. No. BA271293)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Kathleen Kennedy-Powell, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Lewis Hardin was convicted by a jury of two counts of first degree murder (Pen. Code, § 187),<sup>1</sup> with special circumstance findings of murder for financial gain and multiple murder (§ 190.2, subd. (a)(1), (3)). He was spared the death penalty and sentenced to life in prison without the possibility of parole. Appellant entered the home of the victims, Hubert (Burt) and Barbara Souther, as they slept in their bed and murdered them. Appellant murdered the Southers at the behest of codefendant Theodore Shove, who coveted the victims' successful salvage business and plotted their murders. Shove was tried with appellant and received the death penalty.<sup>2</sup>

Appellant contends that the trial court erred when it refused to sever his case from Shove's case or to try the matter with separate juries, denied appellant's *Faretta* motion,<sup>3</sup> prohibited a theory of third party culpability, and refused to give a requested instruction on conspiracy. He also contends that the prosecutor committed misconduct by asking improper questions of a key witness, and that the evidence was insufficient to prove appellant actually inflicted the fatal blows, or aided and abetted other unidentified people, or joined in a conspiracy to murder the victims.

We find the contentions without merit and affirm.

### **FACTUAL SUMMARY**

Burt Souther owned and operated a successful surplus hardware business, Cal Aero, located in Paramount. Shove wanted to buy Cal Aero, but Souther did not want to

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

<sup>2</sup> At the same trial, the jury found Shove guilty of two counts of first degree murder (§ 187), with special circumstance findings of murder for financial gain and multiple murder (§ 190.2, subd. (a)(1), (3)), and guilty of commercial burglary (§ 459), receiving stolen property (§ 496, subd. (a)), and three counts of sending extortion letters (§ 523).

Shove's automatic appeal is pending in the California Supreme Court (case No. S161909).

<sup>3</sup> *Faretta v. California* (1975) 422 U.S. 806 established the federal constitutional right of a defendant to represent himself in a criminal trial if he voluntarily and intelligently elects to do so.

sell it to him. Shove became obsessed with acquiring the company. Shove ultimately decided to murder Souther and his wife with the intention of getting the business from their daughters, who would inherit it. Shove hired appellant to commit the murders. Sometime during the weekend of September 15, 2001, appellant entered the Southers' home and, as they slept in their bed, brutally beat them to death with a tire iron.

After the murders, Shove tried to extort the Southers' daughters to get the company. Shove also broke into a safe at Cal Aero. Shove was thus charged with commercial burglary, receiving stolen property, and sending threatening letters for extortion, as well as murder. The detailed facts discussed below focus principally on appellant's role in the murders.

### *Background*

In 2001, a few months before the murders, appellant and Shove met. Appellant visited Shove's house on a number of occasions, sometimes attending barbeques. Shove bought cocaine from appellant. Sometimes appellant, Shove, and Shove's wife used cocaine together. Appellant mentioned to his girlfriend, Myrna Dotel, that he had "a job" with Shove, but Dotel did not know what the job entailed.

Souther started his profitable surplus hardware company, Cal Aero, in 1975. The company was a cash-based business, grossed approximately \$220,000 a month, and was worth approximately \$7 million. Souther's two daughters, Collette Kingsley and Allison Renck, each owned 26 percent of the company. Kingsley's husband, Christopher, worked as a manager at Cal Aero, opening and closing the store and taking care of the mail. Renck's husband did not work at Cal Aero.

Shove knew Souther and had repeatedly and increasingly expressed interest in buying Cal Aero. In an effort to buy the company, Shove enlisted Bill Vann, the president and general manager of Cal Aero. However, Souther was not interested in selling his business.

### *The break-in at the Southers' home*

About a week before the murders, Shove broke into the Southers' home located in a somewhat rural area of La Habra Heights. Shove admitted to Vann that he and

someone else burglarized the Southers' home. Shove stayed in the car while his cohort went through the backyard and entered the house through the side door. After the break-in, Souther had to repair a baseball-sized hole in the window of the side kitchen door.

Shove referred to the burglary as a "dry run," and said that they "sent a message to the old man." Shove hoped that the burglary would be enough to get Souther to sell the business to him.

### *The weekend of the murders*

On Thursday, September 13, 2001, Collette Kingsley visited her parents at their home in La Habra Heights. She entered through the kitchen door and noticed that it had been repaired. That was the last time she saw her parents alive. Kingsley spoke to her mother, Elizabeth Souther, on the phone the next morning. She later called her parents several times over the weekend, but no one answered the phone.

On Saturday morning, at approximately 9:30 a.m., Allison Renck called and spoke on the phone to her mother, who told her that someone had broken into the house the past week. She told Renck someone had taken money from her husband's pants, which he had left out by the pool. Renck asked if they had reported the incident to the police, and her mother said no. Renck told her mother to set the alarm at the house, but her mother said it was "such a pain in the butt. I don't like to set the alarm."

Christopher Kingsley, the Southers' son-in-law who worked at Cal Aero, saw Burt Souther at work on Saturday morning until approximately noon. When Kingsley got to work on Monday, it appeared to him that Souther had not been there on Sunday.

On Saturday, the Southers' gardener was at the house as scheduled from approximately 1:00 to 4:30 p.m. The gardener saw the Southers and spoke to both of them.

Typically, Elizabeth Souther went to bed as early as 8:00 p.m. Burt Souther went to bed later than that. On Saturday, September 15, 2001, the night of the murders, appellant and Shove were in regular contact by phone. Between 3:15 p.m. and 10:30 a.m. the following morning, they spoke to each other by phone on 21 occasions. Shove called appellant at least seven times between 3:15 and 9:16 p.m. Then, after a period of phone

silence between them, there were seven calls between midnight and 1:33 a.m. At approximately 4:00 a.m., appellant called his home phone from his cell phone, indicating he was not home during the night.

#### *Discovery of the victims' bodies*

On Monday, September 17, 2001, at approximately 6:30 a.m., Shove called Vann and told him to expect some "good news." When Souther was not at work by 10:00 a.m., Vann became concerned. He called Souther's house several times, but no one answered the phone. Vann then asked Souther's son-in-law, Kingsley, to go to the house and investigate.

Kingsley had noticed that Souther had not shown up for work and was also concerned. He asked some employees if they knew whether Souther was going to be there, but no one knew. Kingsley also called Souther's house, but no one answered the phone. Kingsley then called his wife and asked her to go to the Souther's home.

Collette Kingsley then drove to her parents' house because it was unusual for her father not to go to work. While driving over, she tried calling her parents, but no one answered the phone. When she got to the house, she entered through the kitchen door. The window was broken, the screen was torn, and the door was ajar. There were pry marks on the door frame and the area around the doorknob, and the doorjamb and lock mechanism were damaged.

Kingsley pushed the door open and called for her parents. She walked through the kitchen and family room, and went to the master bedroom. When she saw her parents in bed and covered in blood, she knew they were dead. When she tried to call 911 from the house phone, there was no dial tone. She then went outside and used her cell phone to call 911.

#### *The crime scene investigation*

Four sheriff's deputies entered through the kitchen door to search the house for suspects and victims. They searched all the rooms, found a double homicide, and secured the crime scene until homicide investigators arrived.

There were four newspapers in the driveway, two from Sunday, September 16, and two from Monday, September 17, 2001. At the back of the house was an unopened newspaper from Saturday, September 15.

Criminalists investigated the crime scene for two days. They sampled bloodstains in the bedroom, as well as a blood trail that led out of the house, across the yard and over the back wall. Criminalists found and photographed five shoe prints in the house. They also found two small pieces of a latex glove in the bedroom. On the bed was a yellow blanket with the bloody impression of a tire iron.

Criminalists described the bedroom as “heavily bloodstained.” Blood was on the bed, the sheets, the pillow cases, the headboard, the wall, some shelves, and the floor. Blood was also on a tile wall near an outdoor bathroom and shower area. A bloody handprint and other bloodstains were on a block wall at the north end of the property. The criminalists collected samples only of representative bloodstains along the blood trail; many of the bloodstains were not sampled. The other side of the block wall was covered in ivy and sloped down to the street. A portion of that area had been walked through and was indented.

DNA from 11 bloodstains collected inside and outside the home at least partially matched appellant’s DNA; seven bloodstains definitely matched appellant’s DNA. Appellant’s blood was found at the following locations: on the tile floor of the living room, on the tile floor of the kitchen, on the ground just outside the kitchen door, in three spots on the ground between the kitchen door and the pool, on the blue tile next to the pool, on the ground north of the pool, on the tile wall near the outdoor bathroom on the north end of the house, near the block wall at the north end of the property, and in a bloody handprint on the top of the wall.

In two places, appellant’s blood was found mixed with DNA that may have been DNA from Burt or Barbara Souther. Blood from Burt and Barbara Souther was found on both sides of the kitchen door, as well as on the imprint of the bloody tire iron. Burt Souther’s DNA was found on one glove piece. All the DNA found matched either appellant or the victims.

Burt Souther suffered multiple blunt force injuries to his head and face, and his skull was fractured several times. He had five fractured teeth, and his left earlobe was nearly torn off. He had multiple defensive injuries to his hands and arm. The cause of his death was blunt force trauma to the head. Barbara Souther died of blunt force trauma to the head and face, as well as asphyxiation by smothering, as with a pillow. The blunt force trauma suffered by both victims was consistent with injuries inflicted by a tire iron.

The medical examiner determined that the time of deaths was within two hours of midnight on Saturday night. The victims' daughters indicated to the police that nothing was missing from their parents' home.

#### *Events after the murders*

Sometime in September (after September 11, 2001), appellant told Dotel that he was going to stay at his father's house in Long Beach for a few days. After a few days, appellant asked Dotel to bring him some money. He also told her to "watch [her] back," and to make sure nobody was following her. When she asked appellant to explain, he refused to do so.

Appellant had a deep cut on his right hand that was swollen and raw. The cut was below his thumb and fingers, toward the base of the palm. Dotel thought the cut needed medical attention and told appellant to go to a doctor, but he refused to do so. Appellant told Dotel, "Just forget what you saw. Just forget about everything. Just leave." Appellant again told her to make sure no one followed her, and she then left. Six years later, scars from the cut were visible on appellant's hand.

Sometime after appellant's hand was cut, Dotel overheard appellant on the phone with Shove. Appellant was upset and was asking when he was going to be paid. Around the time of the murders, Shove's wife heard a voicemail message from appellant for Shove indicating that appellant would go to the sheriffs and tell them what he knew if he did not get his money.

Shove visited appellant at his apartment. Dotel was downstairs and heard Shove say, "No, not yet, because I had to" go or send someone "to clean [the] fucking mess." Appellant said something about money and asked "how long?" Sometime thereafter,

Dotel drove appellant to Shove's house. Appellant could not drive because of the cut on his hand. Appellant told Dotel to wait in the car. He went inside the house, and came out about a half an hour later.

In late September or early October of 2001, appellant and Dotel visited an industrial salvage business. Appellant met Shove there, and then left with an envelope or a check that he put in his shirt pocket. Also after the murders, on several occasions appellant called a salvage company where Shove's daughter, Kimberly Hernandez, worked and tried to speak with Shove. Hernandez told appellant that Shove would call him.

On one occasion appellant told Hernandez that he urgently had to speak with Shove. Hernandez got her father on the phone and then inadvertently connected it as a three-way call. Hernandez overheard appellant tell Shove that his cousin was there and was upset. His cousin then got on the phone and said, "We had a deal. This is ridiculous. You're constantly late with your end of it." Shove ended the conversation, saying, "You better remember who you're talking to. If I said it's going to be there, it's going to be there."

After the murders, Shove had Hernandez make two deliveries to appellant. The first time, Hernandez met appellant at a gas station and gave him a sealed envelope with more than one piece of paper inside. Approximately a week later, Hernandez met appellant at a supermarket and gave him another sealed envelope from Shove. Before making the second delivery, Shove admonished Hernandez, "Don't block yourself in."

At some point, Shove discussed the murders with Vann. As Vann explained, "He told me that they had done the murders the same way as they had done the dry run, the burglary." Shove did not tell Vann who "they" were, but Shove spoke as if he was "part of the they." Shove did not personally enter the Southers' house. Shove also told Vann that he had \$100,000 invested in getting Cal Aero, and he was going to continue his efforts to purchase it. In fact, Shove did pursue efforts to get the business, but he was unsuccessful.

On October 22, 2004, appellant was arrested. Two days later, while appellant was in custody he made a phone call that was recorded. During the recorded call, the following colloquy ensued with an unidentified male: “[Appellant]: I uh, I uh, was supposed to go to an arraignment today, but uh, I guess they didn’t call me today. So uh, maybe tomorrow or something like that. I don’t want no Public Defender, you know um, representing me on a case like this. [¶] UM: Yeah. [¶] [Appellant]: Yeah . . . pretty serious case. [¶] UM: Huh? [¶] [Appellant]: It’s a pretty serious case. [¶] UM: It is? [¶] [Appellant]: Yeah, pretty serious. Just know I didn’t do it by choice. [¶] UM: Huh? [¶] [Appellant]: I said, just know I didn’t do it by choice. [¶] UM: You didn’t do what by choice? [¶] [Appellant]: What this uh, what this case is about. It’s a long story.”

Defense evidence

Neither appellant nor Shove testified at trial.

Neighbors who lived across the street from the Southers had four dogs who were usually quiet. However, on September 15, 2001, they barked nonstop at the Southers’ house from approximately 8:30 p.m. until 10:30 p.m.

In June of 2001, John Mitchell met appellant and thereafter obtained cocaine from appellant that he then sold to Shove. Eventually, Mitchell stopped acting as an intermediary and introduced appellant to Shove, and the two men then dealt directly with each other. Payment for the drugs was in cash, and on at least one occasion the cash was placed in an envelope.

One of the two detectives initially involved in the crime scene investigation remarked about the telephone wires that were cut at the Southers’ house. The detective characterized the phone box as in a location that would not have been noticeable in the dark by anyone other than the residents or someone familiar with the house. Other detectives subsequently involved in the investigation interviewed Vann. Vann told the officers that the people who actually entered the house the night of the murders were Monte Proulx and his acquaintances (referred to as Monte’s Army), and he asserted that they were the people who killed the Southers. Vann explained that he heard about the

involvement of Proulx and Monte's Army from Shove and claimed that he had never heard that appellant was involved in the murders.

## **DISCUSSION**

### ***I. The trial court properly declined to sever appellant's guilt phase trial from Shove's trial or to try the matter with a separate jury.***

Appellant contends that the court's refusal to sever appellant's trial from Shove's trial or to use separate juries violated appellant's constitutional right to due process and a fair trial. However, appellant waived that issue because he did not move to sever the guilt phase of the trial and specifically declined to join in Shove's severance motion. In any event, appellant's claim is unavailing because the trial court did not abuse its broad discretion, and appellant would not have received a more favorable outcome with a separate trial or separate jury.

#### ***Relevant procedural facts and waiver***

Before trial, Shove moved to sever both the guilt phase and penalty phase trials from appellant's, or to have separate juries. As to the penalty phase trial, Shove's counsel argued, in pertinent part, that the death penalty decision is "supposed to be individual," that Shove was not alleged to be the actual perpetrator, and that it would be difficult for one jury to "put that wall up" and separate aggravating and mitigating factors between jointly tried defendants. Appellant joined in the motion, but only with respect to the penalty phase. As appellant's counsel stated to the trial court:

"Well, I would for the record like to join in one aspect of [Shove's] argument, your Honor, and that is in terms of the penalty phase, and that's because of the amount of evidence that is quite substantial as against Mr. Shove. And I think that that is going to—and I'm talking particularly about his past versus the past of my client, which although is not totally without some problems, it certainly doesn't in any way come up to the problems that Mr. Shove has had in his life. And I fear that because of the nature of this case, that being a conspiracy theory, if this case does get to penalty and this, I want to say, mountain of evidence in terms of aggravation comes in against Mr. Shove, that certainly is going to have a horrendous effect."

The court remarked that the mountain of aggravating evidence against Shove would “probably make [appellant] look pretty good by comparison.” Appellant’s counsel specifically acknowledged “that is a way to look at it,” and then stated that “another way to look at it is these two together, these two together, these two together, and that type of thinking will flow over into the penalty phase. And the one thing that [counsel for Shove] has said that I think has great merit here today is that’s going to make an individual opinion about an individual defendant a very, very difficult task for the jurors. And so on that aspect of [Shove’s] argument, I would like to join with the court’s permission so that the record is clear.”

Although appellant claims on appeal that he joined in Shove’s motion to sever the trial or have separate juries for both the guilt and penalty phases, viewing the record in its complete and proper context reveals otherwise. Appellant’s counsel specifically mentioned only the “penalty phase,” complained about the evidence against Shove regarding Shove’s past (which would only be admitted at the penalty phase), expressed no concern about evidence that would be introduced against Shove at the guilt phase, and referred to the argument by Shove’s counsel, who was concerned about ensuring the “individual” treatment of the defendants at the penalty phase. Hence, the record clearly establishes that appellant only joined in Shove’s motion insofar as he sought severance at the penalty phase, not at the guilt phase.

It is well established that generally the ““failure to join in the objection or motion of a codefendant constitutes a waiver of the issue on appeal.”” (*People v. Wilson* (2008) 44 Cal.4th 758, 793.) Specifically, the failure to join in a codefendant’s motion to sever as to the guilt phase of trial waives the issue. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048.) Thus, appellant’s contention now that the trial court should have severed the guilt phase of his trial from the guilt phase of Shove’s trial is waived.

Applicable law as to severance

Even if appellant’s claim was not waived, his contention would be unavailing. Section 1098 provides that defendants who are jointly charged “must be tried jointly, unless the court orders separate trials.” The legislative preference is for joint trials.

(*People v. Hoyos* (2007) 41 Cal.4th 872, 896.) Joint trials are the rule, and separate trials are the exception. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) The trial court generally considers severing codefendants only in certain limited circumstances, and even then “less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice.” (*Ibid.*)

The trial court’s denial of a motion for severance is reviewed for abuse of discretion, based on the facts known and the showing made at the time of the ruling. (*People v. Hoyos, supra*, 41 Cal.4th at p. 896; *People v. Miranda* (1987) 44 Cal.3d 57, 78.) Even if the trial court abused its broad discretion, however, reversal is only required upon a showing that appellant would have received a more favorable outcome in a separate trial. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 41.) If the ruling on a severance motion was correct when made, the reviewing court may reverse the decision only “if a defendant shows that joinder actually resulted in ‘gross unfairness,’ amounting to a denial of due process.” (*People v. Hoyos, supra*, 41 Cal.4th at p. 896.)

Here, there were no exceptional circumstances warranting severance. First, because the trial court simply had no information before it regarding how appellant would have been prejudiced by a joint guilt phase trial, it could not have abused its discretion. Second, although appellant belatedly asserts that his defense and Shove’s defense were “mutually antagonistic,” that was not the case. As indicated by the closing arguments of counsel, Shove argued that the prosecutor failed to prove that appellant was the murderer. In a complementary fashion, appellant’s counsel argued the paucity of evidence against Shove.

However, even conflicting or antagonistic defenses do not require severance (*Zafiro v. United States* (1993) 506 U.S. 534, 538; *People v. Cleveland* (2004) 32 Cal.4th 704, 726), particularly where, as here, defendants are represented by separate counsel. Nor is there any merit to appellant’s emphasis on the fact that Shove was charged with seven counts and appellant was charged with only two counts. Even though appellant was not involved in the burglary or extortion charges, those additional charges against Shove all related to and essentially helped explain the murder charges. Arguably, those

additional charges against Shove and the evidence supporting them only made Shove appear comparatively more culpable than appellant. Also, most of the evidence that could be considered “inflammatory” or “prejudice-arousing” (*People v. Chambers* (1964) 231 Cal.App.2d 23, 27, 28) concerned the brutality of the murders, and such evidence was relevant and properly connected directly to appellant. Hence, no undue prejudice inured to appellant from Shove.

Finally, the case against appellant was not weak in comparison to the case against Shove. Indeed, two days after appellant’s arrest, he stated during a recorded phone call made from jail, that “what this case is about,” meaning two murders, “I didn’t do by choice.” This incriminating admission, as well as compelling DNA evidence, phone records and other substantial circumstantial evidence discussed in more detail hereinafter, lead to the ineluctable conclusion that appellant would not have received a more favorable outcome in a separate trial.

Accordingly, even if we did not conclude that the severance issue was waived, the trial comported with all notions of due process and fairness, and severance was not required.

## **II. The trial court did not err in denying appellant’s pretrial request to represent himself.**

### **Applicable law**

A defendant has the constitutional right to represent himself. (*Faretta v. California, supra*, 422 U.S. 806.) However, the defendant’s request must be knowing, intelligent, and unequivocal. (*People v. Stanley* (2006) 39 Cal.4th 913, 929.) “Courts must indulge every reasonable inference against waiver of the right to counsel.” (*People v. Marshall* (1997) 15 Cal.4th 1, 20, 23.) To effectively assert the right of self-representation, a defendant must assert it “‘within a reasonable time prior to trial.’” (*People v. Valdez* (2004) 32 Cal.4th 73, 102.) There is no bright-line rule for determining when a *Faretta* motion is timely. (See *People v. Clark* (1992) 3 Cal.4th 41, 99.)

The timeliness requirement “‘prevent[s] a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice. [Citation.]

If the motion is untimely—i.e., not asserted within a reasonable time prior to trial—the defendant has the burden of justifying the delay.” (*People v. Valdes, supra*, 32 Cal.4th at p. 102.) An untimely request ““is addressed to the sound discretion of the trial court.”” (*Ibid.*) “[T]he trial court’s determination of untimeliness necessarily must be evaluated as of the date and circumstances under which the court made its ruling; a trial court’s reasonable and proper determination that such a motion is untimely does not become erroneous simply because, for example, an imminent trial ultimately is postponed.” (*People v. Marshall, supra*, 15 Cal.4th at pp. 24-25, fn. 2.)

Regarding the requirement that the request be unequivocal, “the defendant’s conduct or words reflecting ambivalence about self-representation may support the court’s decision to deny the defendant’s motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.” (*People v. Marshall, supra*, 15 Cal.4th at 23.) A reviewing court considers the record as a whole, including proceedings after appellant’s purported invocation of the right to represent himself, to determine whether appellant’s request was knowing, intelligent and unequivocal. (*Id.* at pp. 24-25.)

When a defendant’s *Faretta* request is timely and otherwise proper, the trial court’s refusal to grant it is reversible error per se. (*People v. Joseph* (1983) 34 Cal.3d 936, 946-948.) When the *Faretta* request is untimely, the court’s refusal to grant it is reviewed for an abuse of discretion. (*People v. Burton* (1989) 48 Cal.3d 843, 852-854.)

Relevant proceedings before the trial court

On August 31, 2007, prior to the start of trial,<sup>4</sup> appellant requested a *Marsden* hearing.<sup>5</sup> After the prosecutors left the room, appellant stated he wanted “to exercise my

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<sup>4</sup> Motions in limine were scheduled for September 6, 2007, jury selection commenced on September 12, and the first witness was sworn on September 26.

<sup>5</sup> The legal principles governing a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, are well settled. When a defendant seeks to discharge his appointed counsel

*Faretta* rights” in this death penalty case. The following discussion ensued: “The Court: Now, this matter is scheduled to begin trial with pretrial motions next week on September 6th. That’s Thursday. And I will not continue this matter. I will not appoint investigators or any witnesses or anything else at this point. I mean, you have lawyers that have been—you have two lawyers that have been preparing on this case for months, years. And I just don’t see how your request on the eve of trial could possibly be timely. [¶] [Appellant]: I understand that, your Honor. I would like pro. per. cocounsel if I may. [¶] The Court: Denied. [¶] [Appellant]: So you deny my rights? [¶] The Court: You do not have a right to be cocounsel. [¶] [Appellant]: Isn’t that my 6th Amendment right? [¶] The Court: It is not. [¶] [Appellant]: Well, I’m not going any further with my counsel. I do not feel comfortable at this time going further with my counsel. [¶] The Court: So why—you know, what is the problem? [Appellant]: Well, it’s like night and day. We’re not going to the same direction. We’re going opposite directions. Everything has been eradicated between us. There is no communication.”

When the court asked for more details about appellant’s difficulties with his lawyers, appellant stated vaguely that he had trouble communicating with them, that he was uncomfortable with them, and that “no one is going to fight harder than I am for myself.” The court then asked appellant’s lead attorney for his position. Counsel stated: “Well, I don’t know if I should say anything at this point quite candidly. I thought [appellant] and I had a pretty good relationship. I thought we did. And this comes as somewhat of a surprise to me. I don’t want to say anything that—I’ve discussed this case. I’ve discussed this case in detail with [appellant], laid out the theory of the case that I think has the best chance of success. I thought we were on the same page. I’ve

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and substitute another attorney and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. (*Id.* at p. 124.) A defendant is entitled to relief if the record establishes that the first appointed attorney is not providing adequate representation (*In re Banks* (1971) 4 Cal.3d 337, 342) or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result (*People v. Stankewitz* (1982) 32 Cal.3d 80, 93-94).

found [appellant] very cooperative with me. I probably—I want to say I’ve probably visited him 12 times. I have it down, those visits. During those visits we’ll discuss the case. I did not think—I did not think we had a problem up until just a few moments ago. [¶] The Court: Well— [¶] [Defense Counsel]: I don’t doubt [appellant] is sincere in his thoughts, but it just comes as a surprise to me.”

The court then advised appellant to talk to both of his attorneys privately and articulate specifically what appellant’s position is and what problems he thinks exist with the position taken by his attorneys. The court remarked that if appellant was unhappy and counsel thought there was no problem, then there was likely a problem with communication which could be resolved by spending some “private time” together. Thus, the court suggested “spend[ing] some time communicating, and then we’ll take this issue up next week.”

At the suggestion of appellant’s counsel, the court then explained to appellant that strategic and legal decisions are made by attorneys. The court then added: “And a lot of times when I’ve seen situations like this when there’s *Marsden*-type situations, a lot of times it really is attributed to a failure of communication rather than a dislike or something concerning the lawyer. And a lot of times my experience has been that if people sit down and really talk, maybe they can straighten these situations out. And I would like to see at least an attempt to be made in that regard. So I’m going to bring [appellant] back next week on the 6th, and I expect [defense counsel] to come and talk to you at length, as long as necessary. And I want you really to be very specific what your complaint is, and I want you to be very specific in delineating your situation, and we’ll see if this communication problem can be worked out and we’ll take up the issue again if we need to.”

On September 6, 2007, appellant withdrew his motion for a further *Marsden* hearing and stated he no longer wanted new counsel. On September 12, as the prospective jury panel waited outside, appellant’s counsel stated that “my client . . . is seeking a continuance” because he “does not feel he has been provided with sufficient discovery so that he can participate in his own defense to the level that he so desires.”

However, appellant's counsel informed the court that he was ready to proceed, and the court denied the request for a continuance.

On November 9, 2007, after guilty verdicts and after the penalty phase evidence but before argument in the penalty phase, appellant requested to relieve counsel and represent himself. Appellant stated, "I would like the record to reflect that before the trial began, I wanted to go per se [*sic*], and I was denied twice of my 6th Amendment right. And I am here again, wanted to do the same thing. And I want to relieve my counsel as representing me." When the court asked why, appellant replied, "Because I feel as though that I have been unjustly represented. They have been ineffective in this case and in this trial."

The court found that there was no basis to relieve counsel. The court further ruled that appellant's request to represent himself at the end of the penalty phase was untimely and improper. The court remarked, "And the defendant didn't testify in this case, and the court suspects that his request to represent himself is so that he could somehow bring some statement before the jury that would not be subject to cross-examination. And [it] is not proper because he could have testified and elected not to. And right now we are almost finished, and all we have left is argument. And the court finds that this request at this juncture is untimely, and the request is denied."

Appellant responded as follows: "Well, your Honor, I would just like to state that I told you from the beginning that we were going opposite directions; that their way was not my theory. Their way is not my way."

On January 31, 2008, after trial, appellant again requested new counsel. While making this request, appellant recalled, "Your Honor, if I may, as you know, I stipulated before trial that I didn't want to represent myself and go pro. per." After the court denied appellant's request for new counsel, appellant stated his desire to represent himself. After some discussion, the court permitted appellant to proceed in pro. per., and appellant requested a continuance. The court granted a continuance to April 1, 2008.

On June 2, 2008, at appellant's sentencing, appellant made yet another *Marsden* motion, contending that he was ineffective in representing himself. Appellant requested

that the court appoint an attorney to represent him. The court indicated it would re-appoint appellant's trial counsel, and appellant vacillated as to what he wanted to do. Appellant ultimately decided to represent himself at sentencing. He again requested a continuance, which the court denied.

During this final discussion, the court remarked that appellant had previously raised issues about his counsel, "and then there were opportunities that I gave you to confer with your counsel and then you did not pursue those claims and indicated that you wished to proceed with counsel at those various times—before the trial and during the trial."

*The trial court did not erroneously deny appellant's pretrial Faretta request*

Appellant's counsel on appeal contends that "[o]n August 31, 2007, invoking *Faretta*, appellant made a clear, explicit, and unequivocal request to represent himself." The main problem with this contention is that it frames what transpired on August 31 in an oversimplified manner that does not properly characterize what actually occurred.

At the outset of the *Marsden* hearing on that date, appellant asserted he wanted to exercise his "*Faretta* rights" and "go pro. per.," but he then proceeded to explain that what he actually wanted was "pro. per. *cocounsel*" status. (Italics added.) Appellant thus did not want to represent himself; he wanted to add himself as, in essence, the third counsel on his case. The court promptly and correctly denied his request and stated, "You do not have a right to be cocounsel."

"Although under *Faretta, supra*, 422 U.S. 806, an accused has a constitutionally guaranteed right of self-representation, the Constitution affords no corresponding right to assist one's attorney as cocounsel. Rather, the determination whether to grant such a request is within the sound discretion of the trial court. [Citations.]" (*People v. Andrews* (1989) 49 Cal.3d 200, 219.) As the Supreme Court observed in *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162, the judicial discretion to grant a motion for cocounsel status is "sharply limited." The court explained, "We have consistently held that the court should not do so except 'on a substantial showing . . . that in the circumstances of the case the cause of justice will thereby be served and that the orderly and expeditious

conduct of the court's business will not thereby be substantially hindered, hampered, or delayed.' [Citations.] [¶] Undesirable tactical conflicts, trial delays, and confusion often arise when a defendant who has chosen professional representation shares legal functions with his attorney. [Citations.] We therefore reaffirm that the court should not sanction such an arrangement except on a 'substantial' showing that it will promote justice and judicial efficiency in the particular case. Since defendant entirely failed to make such a 'substantial' showing here, there was no basis for exercise of the court's discretion. For this reason alone, defendant's motion was properly denied." (48 Cal.3d at p. 1162, fn. omitted.)

Here, appellant offered no specific explanation of how granting him cocounsel status would have, for example, enhanced the ability to develop trial strategy, or locate witnesses, or perform legal research necessary for his defense. Appellant was represented by two attorneys who participated extensively at trial, and "he failed to make a substantial showing that granting him cocounsel status would have been in the interest of justice and judicial efficiency." (*People v. Andrews, supra*, 49 Cal.3d at p. 220.) Thus, "there was no basis for exercise of the court's discretion," and denial of the motion was proper. (*People v. Hamilton, supra*, 48 Cal.3d at p. 1162.)

On appeal, appellate counsel mistakenly construes appellant's comments at the August 31, 2007, hearing as initially seeking under *Faretta* the right to represent himself in pro. per. and then, only when the court denied his *Faretta* request, did appellant seek the right to be cocounsel. However, the court merely remarked that it did not "see how your [*Faretta*] request on the eve of trial could possibly be timely," and had not yet actually denied appellant's request. Appellant then immediately replied, "I understand that, your Honor. I would like pro. per. cocounsel if I may." Thus, appellant apparently knew his exercise of traditional *Faretta* rights, i.e., representing himself without cocounsel, was untimely and instead sought cocounsel status. This view of the record is also consistent with appellant's remark after the trial, on January 31, 2008, at which time he acknowledged, "Your Honor, if I may, as you know, I stipulated before trial that I didn't want to represent myself and go pro. per."

In any event, to the extent appellant's view of the record is correct and appellant did initially intend to exercise *Faretta* rights and represent himself without cocounsel, his expression of that desire at trial was not clear and unambiguous. Indeed, the lack of clarity on this issue prior to trial is supported by appellant's comments during a *Marsden* hearing in the midst of the penalty phase proceedings. On November 9, 2007, appellant asserted that his counsel's representation had been ineffective and remarked, "I would like the record to reflect that before the trial began, I wanted to go per se [*sic*], and I was denied twice of my 6th Amendment right." This remark—which is inconsistent both with appellant's January 31, 2008, remark and with the events on August 31, 2007—only reveals more ambiguity and lack of clarity in appellant's request, which supports the denial of a *Faretta* request.

Moreover, assuming again that appellant's August 31 remark is construed as a traditional *Faretta* request, it was also untimely, as the trial court aptly remarked. This *Faretta* request was one week before pretrial motions were set to be heard and 12 days before the trial was to begin. The matter was a capital case that had been pending for almost three years since appellant's arrest in October of 2004. The trial was estimated to last six weeks. Under the circumstances, appellant's request was not made within a reasonable time prior to trial and was untimely. (See *People v. Valdez*, *supra*, at p. 102.)

Appellant's argument that he sought self-representation with the understanding that he would not obtain a continuance is belied by his subsequent request for a continuance, made through counsel, on the first day of trial. Significantly, appellant's stated reason for requesting more time was that he "does not feel he has been provided with sufficient discovery so that he can participate in his own defense to the level that he so desires." That such a request was made when he was represented by counsel is a strong indication that he would have requested a continuance had he been permitted to represent himself.

Finally, even if the trial court had abused its broad discretion in denying appellant's untimely request to represent himself (and not to act as cocounsel), and even if appellant's request was not equivocal, appellant must show that it is reasonably

probable that he would have obtained a more favorable outcome. (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant's counsel on appeal asserts that his trial counsel helped him "avoid[] the death penalty, but nothing else." However, as the trial court aptly noted, this was not an insignificant achievement, especially where appellant's codefendant received the death penalty and the evidence strongly suggested that appellant was the one who wielded the deadly tire iron.

Although appellant underplays the evidence against him, as discussed in more detail hereinafter, the evidence of his guilt was substantial. Appellant has not pointed to any errors made by trial counsel or identified any way in which he may have succeeded where counsel did not. Appellant was thus not prejudiced by any possible error in denying his untimely motion.

Accordingly, appellant's *Faretta* claim does not warrant reversal of his conviction.

**III. The trial court's pretrial ruling excluding evidence of third party culpability was proper.**

Appellant contends the trial court improperly excluded evidence of third party culpability.<sup>6</sup> However, appellant did not raise this issue at trial and thus waived it. Also, third party evidence was introduced and appellant's counsel argued this theory to the jury, negating any prejudice from the court's pretrial ruling.

**Relevant proceedings in the trial court**

On August 22, 2007, the prosecution filed a written motion to exclude evidence of alleged third party culpability. On September 11, the court heard the motion, with

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<sup>6</sup> The heading in appellant's opening brief also includes a perfunctory claim that the trial court erred in excluding jury instructions on third party culpability. However, appellant does not cite to any place in the record where he requested such jury instructions, nor does he provide any argument or analysis regarding such instructions. Thus, the issue of third party culpability jury instructions has not been properly raised as a discrete contention on appeal and is waived. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304; *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.)

extensive argument from the prosecutor and counsel for codefendant Shove. Shove's counsel argued at length about why he believed the victims' son-in-law, Kenneth Renck, may have been involved in the murders. The court deferred ruling on the motion until the defense could point to any specific evidence that linked Renck to the crime. The following week, the court again addressed the issue, heard more argument, and noted that some of the evidence might be admissible as a prior inconsistent statement or as relevant for other reasons. For example, the court found that evidence of unidentified footprints found at the scene was admissible, and that the defense could argue that the footprints belonged to someone other than the defendants.

However, the court also ruled that under *People v. Hall* (1986) 41 Cal.3d 826, the defense had not met its burden regarding the admission of third party culpability evidence. The court noted that even accepting a tenuous motive and opportunity by Renck, there was nothing concrete actually connecting him to the crimes. The court explained that there was no evidence, for example, of numerous phone calls between Renck and appellant on the day of the murders and none of Renck's DNA, fingerprints or footprints at the crime scene.

The court concluded that although there was evidence that Renck was a "real crass guy that nobody liked very well," and it would be improper for the court to "get into this whole thing of dirtying up Kenny Renck to show everybody what a crass guy he is when you haven't met the whole standard of having some kind of connecting evidence, be it circumstantial or direct, which actually connects Kenny Renck to the crime. And from what you have here, there is nothing. And so I think it would be very confusing to the jury, time consuming, [to] distract them from what their job is in this case, which is to decide that there is sufficient evidence to prove that Mr. Shove is guilty. And you know, there may be none; I don't know. But you have not met the standard for third party culpability." Thus, pursuant to Evidence Code section 352 and the *People v. Hall, supra*, 41 Cal.3d 826, the court refused to admit the evidence Shove sought to introduce.

Appellant did not object to the exclusion of third party culpability evidence and thus waived the issue

It is uncontested that appellant did not join in Shove's opposition to the prosecution's motion to exclude third party evidence. Appellant urges that we exercise our discretion to ignore the waiver problem and address the merits because Shove's counsel included appellant in his arguments on this issue.

First, the notion that Shove's counsel included appellant in his argument is true only to the extent that counsel remarked factually, as appellant points out by example, that there was no evidence appellant knew the victims or had any hatred for them. However, Shove's counsel did not specifically include appellant in his objection to the prosecutor's motion or join with appellant in legal opposition. Second, although an appellate court has discretion in some situations to reach a question that has not been preserved for review by a party, "it is in fact barred when the issue involves the admission (Evid. Code, § 353) or exclusion (*id.*, § 354) of evidence." (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.)

Moreover, the issue is further waived to the extent appellant now belatedly asserts third party culpability evidence should have been admitted regarding anyone other than Renck. Renck was the sole subject of Shove's request to present third party culpability evidence. The only evidence presented to the court involved Renck, and the only evidence the court ruled on in this regard concerned Renck. Thus, any claim appellant now makes about third party culpability evidence regarding Monte Proulx, his acquaintances referred to as "Monte's Army," or other persons, is also waived.

In any event, the trial court properly precluded third party culpability evidence much of which, however, was nonetheless introduced, thus extinguishing any possible prejudice

It is well settled that third party culpability evidence is admissible if it is "capable of raising a reasonable doubt of defendant's guilt." (*People v Hall, supra*, 41 Cal.3d at p. 833.) However, "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's

guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” (*Ibid.*) There must be some link between the third party and the crime itself. (*People v. Page* (2008) 44 Cal.4th 1, 38-39.)

After the court determines there is direct or circumstantial evidence linking a third person to the crime, the court then applies Evidence Code section 352. (*People v. Hall, supra*, 41 Cal.3d at p. 833.) Admission of third party culpability evidence is thus “based upon its relevance and weight as against its capacity to confuse, delay or prejudice.” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1174; see *People v. Mendez* (1924) 193 Cal. 39, 52.)

In the present case, the trial court relied upon the appropriate legal principles and gave codefendant Shove ample opportunities to present specific evidence that linked Renck—or anyone else—to the murders. However, Shove’s counsel could point to nothing more than inadequate innuendo and hearsay speculation. The court thus properly excluded the proffered third party culpability evidence. (See *People v. Samaniego, supra*, 172 Cal.App.4th at p. 1175.)

Nonetheless, as the trial ensued, the defense did introduce a fair amount of evidence it deemed supportive of third party culpability. Ironically, appellant recounts much of this evidence in his opening brief in arguing the purportedly substantial and reliable nature of the third party culpability evidence. For example, appellant pointed out Renck’s awareness of the phone box and wiring at the victims’ house, Vann’s lack of knowledge of appellant, and Shove’s statement to Vann that Monte Proulx and his acquaintances (Monte’s Army) wore fatigues and carried weapons and would take care of any problems.

As in *People v. Hall, supra*, 41 Cal.3d at p. 835, such evidence rendered the pretrial ruling to exclude evidence harmless. Moreover, the defense was permitted to and did argue that various third parties may have committed the murders. Significantly, however, regarding the possibility of Renck’s being involved in the murders, the argument by appellant’s counsel specifically excluded Renck from among the possible culprits. As appellant’s trial counsel argued to the jury, “[T]here were at moments some

suggestion that perhaps somebody or—Kenneth Renck, in particular, may have had something to do with the death of the Southers. If you noticed, I never touched that because I don't believe there is one scintilla of evidence that Kenneth Renck ever did anything wrong in reference to this case.”

Thus, despite the wishful thinking and the efforts of appellant and Shove, none of the evidence presented, whether introduced or set forth in argument, actually linked anyone to the murders other than appellant and Shove. None of the evidence put anyone other than appellant at the murder scene. Critically, no evidence limited the number of perpetrators. Hence, even assuming that someone else participated in the crime, it would not have undermined the compelling substantial evidence supporting appellant's participation in the murders. (See *People v. Hall*, *supra*, 41 Cal.3d at p. 835.)

As the court aptly remarked at sentencing, “whether there were other individuals involved in addition to [appellant] and Mr. Shove is a matter that there is some question about.” The court noted that a phone call between Shove and appellant with appellant's cousin “at least create[d] a suggestion that there may have been somebody, in addition to you and Mr. Shove, that [was] involved in the murder—the murders that took place; however, as far as you are concerned and this trial is concerned, it was your participation and culpability that this jury had to decide.”

Accordingly, appellant's efforts to show the possible involvement of various other third parties does not in any way undermine the evidence of his own culpability. Substantial evidence established appellant's guilt, regardless of anyone else's involvement. For the various reasons discussed above, there is no reversible error as to third party culpability evidence.

#### **IV. The prosecutor did not commit misconduct.**

Prior to testimony by Dotel, appellant's trial counsel objected to the prosecutor's eliciting any evidence that after the murders appellant allegedly took Dotel to the desert, threatened her with a gun, and generally intimidated and abused her. The court ruled that the prosecutor should not elicit such evidence on direct examination, and that appellant's counsel should also “be careful” on cross-examination.

After Dotel’s direct testimony, counsel for Shove asked Dotel if she was “pretty close” to appellant when they lived together. Dotel replied, “No, not close, no,” and stated, “One thing is living with a person that won’t leave your house, and another thing is living with a person that you are good with.” On redirect examination, the prosecutor noted that Dotel had been asked about appellant’s staying at her house and she commented that “a person couldn’t leave.” The prosecutor then asked, “Can you explain what that—” Counsel for appellant and Shove both objected on the ground of “relevance.” The prosecutor argued that counsel for Shove had opened the door to such questioning, and that the prosecution had a right to inquire because otherwise it appeared that Dotel was “looney,” since Dotel allowed appellant to stay at her house but did not want him there.

The court ruled that the prosecutor could “ask her, you know, if they were living together but they did not have an intimate relationship at the time or something; you can ask that if you want. But we are not going to go into this [domestic] violence business.” The prosecutor then asked a series of questions about whether Dotel had asked appellant to leave and was able to get appellant out of her house, culminating in, “Were you afraid of him?” Counsel for appellant and Shove both objected to that question on the ground of “relevance,” the court sustained the objection, and Dotel did not answer the pending question.

Appellant contends that the trial court should have sustained the first objection, that the entire line of questioning was prosecutorial error, and that the final unanswered question was prosecutorial misconduct. We find, however, no reversible error.

Applicable law

It is well settled that only “[a] prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct [under state law], and such actions require reversal under the *federal* Constitution when they infect the trial with such “unfairness as to make the resulting conviction a denial of due process.””” (*People v. Lopez* (2008) 42 Cal.4th 960, 965.) “[T]he question is whether there is a reasonable

likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.”” (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

An error under state law must be reversed only “when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment.” (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.) Misconduct that rises to the level of denying due process does not warrant reversal of the conviction if the reviewing court finds beyond a reasonable doubt that the comments did not affect the jury’s verdict. (*Ibid.*) “In either case, only misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm.” (*Ibid.*)

Waiver, lack of misconduct, and harmless error analysis

Appellant acknowledges that to preserve a claim of prosecutorial misconduct for appeal the defendant must timely object on that specific ground and request an admonition; only if an admonition would not have cured the harm is the claim not waived. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 90; *People v. Najera* (2006) 138 Cal.App.4th 212, 219-224.)

Appellant contends that he should be excepted from this waiver rule, however, because his initial objection to the prosecutor’s line of questioning was overruled. That exception is based on the notion of futility and applies where a court’s overruling is immediate, thereby precluding any opportunity to request an admonition. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Here, however, the objection was overruled after a lengthy sidebar discussion, during which defense counsel had the opportunity to raise any grounds for objection—but he did not assert any claim of misconduct. Also, the prosecutor’s final question, which appellant characterizes as “outright prosecutorial misconduct,” was *objected to only on the ground of relevance*, not misconduct, and that objection was sustained with the witness not answering the question. Thus, this misconduct complaint by appellant was also waived.

In any event, even assuming the complaints were properly preserved for appellate review, there was no misconduct. After the initial defense objection, the prosecutor

asked that the witness be allowed to explain why appellant had been living with her even though they were no longer together. The court permitted such testimony, but directed the prosecutor not to ask about appellant's violence toward Dotel. The prosecutor's questions were appropriately tailored to the court's ruling, and even the final question did not specifically mention violence or threats to Dotel. The question of whether Dotel acted the way she did because she was afraid of appellant related to her state of mind and explained her actions. Otherwise, Dotel's conduct could arguably appear inexplicable or "looney," as the prosecutor suggested. It was not deceptive or reprehensible to ask such a question, and it did not constitute the intentional elicitation of inadmissible testimony.

Finally, even assuming some misconduct in asking the questions, any error was utterly harmless. In the context of the entire trial, the evidence portion of which lasted over three weeks, it is not reasonably possible that the questioning complained of now affected the jury's verdicts. The evidence against appellant was substantial, and appellant's relationship with Dotel was not a crucial issue. In fact, the trial court agreed with appellant and deemed the question *irrelevant*. Also, Dotel did not answer the question, and the jurors were subsequently instructed that the attorneys' questions are not evidence and that they may "not guess what the answer might have been." The jury is, of course, presumed to have followed the court's instructions in this regard. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 961; see *Parker v. Randolph* (1979) 442 U.S. 62, 73.)

Accordingly, appellant's claim of prosecutorial misconduct is without merit.

**V. Substantial evidence supports the jury's guilty verdicts.**

**Applicable law**

"When reviewing a claim of insufficiency of evidence, we must view the evidence in the light most favorable to the verdict and presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584-585; see also *People v. Cervantes* (2001) 26 Cal.4th 860, 866.) Although the appellate court must ensure the evidence is reasonable in nature, credible,

and of solid value, we must also be mindful that it is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts upon which its verdict is based. (*People v. Thornton* (1974) 11 Cal.3d 738, 754.)

“The proper test for determining a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Jones* (1990) 51 Cal.3d 294, 314.) “If the [jury’s] findings are reasonable and supported by substantial evidence, reversal is not warranted because a contrary finding might also be reasonable.” (*People v. Glenos* (1992) 7 Cal.App.4th 1201, 1211.) And, the standard is the same when the evidence is circumstantial. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

*Substantial evidence supports appellant’s murder convictions*

As appellant acknowledges, the prosecutor’s theory was that Shove hired appellant to do away with the Southers so Shove could buy Cal Aero from the Southers’ heirs at a discount. The prosecutor theorized that Shove hired appellant as the hit man because Shove and appellant knew each other (from Shove’s previously purchasing drugs from appellant), and that Shove may have paid appellant for the deed when he twice asked his daughter to deliver to appellant envelopes that may have contained money. Appellant admits that there were multiple telephone calls between Shove and appellant in the months before the murders, as well as many phone calls between them on the night of the murders, and that a wealth of substantial evidence established that Shove was the mastermind of the murder plot.

However, appellant contends that substantial evidence was lacking as to the identity of the actual perpetrator of the murders. Specifically, appellant argues that the forensic evidence established only that he had been inside the Southers’ house but never in the bloody bedroom, and that the circumstantial evidence against him did not establish his guilt beyond a reasonable doubt. To the contrary, a more complete view of the forensic and circumstantial evidence reveals substantial and compelling evidence of appellant’s guilt.

In addition to the evidence summarized by appellant, other compelling evidence warrants appropriate focus. Appellant told Dotel, his live-in girlfriend at the time, that he had “a job” with Shove. During the night of the murders, appellant and Shove were in regular contact, with 21 calls between them from 3:15 p.m. on Saturday, September 15, 2001, until 10:30 a.m. the following morning, with a hiatus in the phone calling between late in the evening and midnight. The coroner estimated the Southers’ time of death at within two hours of midnight. At approximately 4:00 a.m., appellant called his home phone from his cell phone, indicating he was not home during the night.

During an investigation of the murders, appellant’s blood was found in a trail leading from inside the house, through the kitchen door with a broken window, through the yard, to a block wall at the back of the property. DNA from 11 bloodstains collected inside and outside the home was at least partially matched to appellant. Seven bloodstains were definite DNA matches, meaning there was enough quality DNA collected to determine a full profile and make a match.

Appellant’s blood was found inside the victims’ home, on the living room floor and on the kitchen tile floor. Appellant’s blood was also found on the ground just outside the kitchen door, in three areas on the ground between the kitchen door and the pool, on the tile next to the pool, on the ground north of the pool, on the tile wall near the outdoor bathroom at the north end of the house, near a block wall at the north end of the property, and in a bloody handprint on top of the wall. There were many more blood spots along the trail that the criminalists did not collect or sample. When criminalists observe a blood trail, they typically only collect samples from the beginning and the end and then one or two from the middle of the blood trail.

In two places, appellant’s blood was found mixed with DNA that may have been DNA from the victims. The bloodstain in the living room, which was the bloodstain closest to the bedroom, contained appellant’s DNA mixed with other unidentifiable DNA. The victims’ blood was also found on both sides of the kitchen door. There was no identifiable DNA found that did not match either appellant or the victims.

At about the time of the murders, appellant left home for several days. The next time Dotel saw appellant, he had a deep cut on his right hand that was swollen and raw. Appellant refused to see a doctor, and told Dotel to just forget what she saw. He also advised her to watch out and make sure she was not being followed.

Shove admitted to Vann that he had someone murder the Southers. As Shove told Vann, “[T]hey had done the murders the same way as they had done the dry run, the burglary.” After the murders, appellant was heard several times asking Shove when he was going to be paid. On one occasion, appellant went to see Shove and returned with a check or an envelope. Shove’s daughter delivered two envelopes to appellant after the murders. Although Shove had in the past bought cocaine from appellant, Shove had always paid in cash and without an envelope.

Two days after appellant’s arrest on the murder charges, he was recorded at the jail during a conversation with a friend. Appellant told the friend, “Just know I didn’t do it by choice.” When his friend asked to what he was referring, appellant said, “what this case is about.” The case was only about murder. Appellant urges that this admission could have likely referred to a drug deal and not murder. However, appellant was not charged with drug-related offenses, and thus his admission clearly related to the murder of the Southers.

Therefore, substantial circumstantial evidence and reasonable inferences therefrom sufficiently established that, when viewing the entire record, a rational trier of fact could find appellant guilty of the murders beyond a reasonable doubt. Appellant dwells on the fact that his blood was not found in the Southers’ bedroom. However, the criminalist who took blood samples from the bedroom explained that he limited his collection of blood at that location because of the large volume of blood readily attributable to the victims. As he explained, “finding [the perpetrator’s] blood in an area that’s heavily bloodstained where victims are injured would be very difficult to find that.” So, the criminalist explained that he moved back away from the large concentration of blood and took samples farther from the bed. He did not take samples, for example, on the blood-

spattered wall behind the victims because it appeared consistent with bloodstaining from the victims' heads.

Therefore, it was quite understandable that from the relatively few samples taken from the bedroom all of the identifiable blood was from the victims. And, of course, the fact that appellant's DNA did not show up in those few blood samples from the bedroom does not mean that his DNA was not actually in the bedroom. Indeed, in several samples from other locations appellant's blood was mixed with DNA that may have belonged the victims. Also, the victims' blood was found along the trail of appellant's blood.

In a similar vein, appellant's suggestion that he was not the killer because his DNA was not found on the two small pieces of glove found in the bedroom is unpersuasive. The glove fragments were very small: 3 by 5.5 centimeters, and 4.5 by 8 centimeters. The only DNA found on them belonged to Burt Souther. There was blood on the glove fragment where that DNA was found, and DNA from the blood may have overwhelmed any other DNA that may have been present. Also, the glove fragments were checked for fingerprints before they were tested for DNA, and that process may have removed any DNA present. Therefore, the absence of appellant's DNA on those two glove fragments does not mean that appellant did not wear the gloves used at the murder scene. Rather, the only conclusion is that the DNA of the person who wore the gloves was not detected on those two small glove pieces.<sup>7</sup>

Accordingly, the jury was entitled to infer appellant's presence and participation in the murders from all the above evidence. There was no evidence appellant knew the victims or had any legitimate reason to be on their property and in their home. There was no innocent or legitimate reason for his trail of blood leading from inside their home, through their yard, and over a back wall. How exactly appellant cut his hand while at the

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<sup>7</sup> Likewise, the shoeprint evidence does not exonerate appellant. The shoeprints found at the scene were not matched to any particular shoe or any particular person. But the shoeprints do not negate the volume of incriminating evidence pointing to appellant.

Southers' residence is not determinative of his guilt, though a reasonable inference is that he cut it while murdering the Southers.

The bottom line is that abundant substantial evidence supports the jury's verdicts.

**VI. The trial court properly refused to instruct the jury with CALJIC No. 6.19, regarding acts done before a conspirator joins a conspiracy.**

The prosecution's theory of liability premised on conspiracy was presented as an alternative to theories of liability based on appellant's liability as a principal or an accomplice. Appellant contends that the core of his defense was that although he did have a severe cut on his hand and his blood was found inside and outside the Southers' home, appellant purportedly got only as far as the living room and that by the time he got there, the Southers were already dead. Therefore, according to appellant, he could not be liable for the acts of other conspirators because if he joined the conspiracy at all, it was after the goal of the conspiracy had been accomplished by others.

Appellant requested that the court instruct with CALJIC No. 6.19, which provided in pertinent part that "[a] person who joins a conspiracy after its formation is not liable or bound by the acts of the conspirators for any crime committed by the conspirators before that person joins and becomes a member of the conspiracy." The court refused to give the instruction "because there's no evidence as to when the conspiracy formed, so therefore I'm not going to give it."

Appellant asserts that CALJIC No. 6.19 was a pinpoint instruction that should have been given. A pinpoint instruction relates "particular facts to a legal issue in the case or 'pinpoint[s]' the crux of the defendant's case." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) A trial court is required to give a pinpoint instruction requested by the defense only if there is evidence to support it. (*Ibid.*; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1115-1116.)

In the present case, there is no substantial evidence supporting the requested instruction. Appellant's hypothetical scenario—that he only got as far as the Southers' living room and that they were already dead by the time he joined the conspiracy—is pure speculation. "Although such a course of thought is possible, there was no direct or

circumstantial evidence of it here.” (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.) Indeed, appellant’s unsupported notion that he belatedly joined the conspiracy would require the jury to ignore the many phone calls between appellant and Shove throughout the night of the murders, and to ignore appellant’s admission that he did “what this case is about.”

Accordingly, there was no evidence presented that appellant entered the conspiracy after the murders had already occurred, and the trial court properly refused to instruct pursuant to CALJIC No. 6.19.<sup>8</sup>

### **DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.

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<sup>8</sup> Finally, there is no merit to appellant’s contention that cumulative errors deprived him of a fair trial and requires reversal of his conviction. There was little or no error, and certainly none prejudicial, to accumulate. (*People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692.) Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the process or accrue to appellant’s detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo* (1993) 6 Cal.4th 585, 637.) The California Supreme Court has held, “[A] [d]efendant [is] entitled to a fair trial but not a perfect one.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; see *People v. Mincey* (1992) 2 Cal.4th 408, 454.) In this case, appellant indeed received a fair trial.